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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

UNITED STATES OF AMERICA, APPELLANT

v.

FIRST NATIONAL BANK AND TRUST COMPANY OF LEXINGTON, SECURITY TRUST COMPANY and FIRST SECURITY NATIONAL BANK AND TRUST COMPANY OF LEXINGTON

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF KENTUCKY

BRIEF FOR APPELLEES

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BRIEF FOR APPELLEES

QUESTIONS PRESENTED

1. Whether it was clearly erroneous for the district court to find from the evidence that the consolidation of First National Bank and Trust Company of Lexington and Security Trust Company into First Security National Bank and Trust Company of Lexington on March 1, 1961, did not constitute an unreasonable restraint of trade under Section 1 of the Sherman Act.

2. Whether before deciding the Section 1 question this Court should consider remand of the case to the district court with directions to hear, and transmit to this Court for filing as a supplemental record herein, proof regarding competition between local banks since the trial of this action, and regarding problems of divestiture created by operating the consolidated bank as a single institution since March 1, 1961.

STATEMENT OF THE CASE

General

Prior to opening for business on March 1, 1961, First National Bank and Trust Company of Lexington ("First National"), a national bank, and Security Trust Company ("Security"), a state chartered bank, were consolidated into First Security National Bank and Trust Company of Lexington ("First Security"), a national bank (R. 358, 432).[1] It has been operated continuously since that time and is now being operated as a single consolidated bank. Every statutory and regulatory requirement governing the method and procedure for effecting this consolidation was complied with in detail (R. 1247).

Later, on the same day that the consolidation was effected, appellant filed this action (R. 1248) under Section 4 of the Sherman Act[2] for an injunction to enjoin the proposed merger (R. 6) because of alleged violations of Sections 1 and 2 of the Sherman Act.[3]

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[1] "R" refers to the Transcript of Record; "PX" refers to the Government's exhibits; "DX" refers to defendant's exhibits; and "AMR" refers to the affidavit of LeRoy Miles in support of the motion to remand filed simultaneously with this brief.

[2] 15 U.S.C. 4, 26 Stat. 209 as amended.

[3] 15 U.S.C. 1 and 2, 26 Stat. 209 as amended.

Thereafter, the complaint was amended to add First Security as a party defendant on allegations that the consolidation had been consummated before the original complaint was filed. The Government has not filed any pleading in which the specific remedy of divestiture is sought (R. 6, 22-23). Extensive proof was taken for discovery purposes (R. 711-714) and the case was tried almost one year after the consolidation was effected (R. 1246).

On July 27, 1962, exactly six months after the trial was completed, the trial court's opinion was rendered (R. 1250) in which it was concluded that "... *the consolidation herein referred to clearly appears to have been the result of a lawful program of expansion on the part of the merging banks rather than an invidious scheme to restrain competition or to secure monopoly in the local field of banking*" (R. 1249).

Background of Consolidation and Reasons For It

The City of Lexington is located in the heart of the Blue Grass country of Kentucky, long famed for the raising and breeding of Thoroughbred horses, the production of burley tobacco and the distilling of good bourbon whisky. Prior to World War II the area was primarily agricultural, but the intervening years have seen a tremendous industrial growth. Many national concerns have established branches and plants in the area and Lexington has become a wholesale distribution center. It has a strategic geographic location and two new interstate highways—I-64 and I-75, running north and south and east and west—intersect near the city (R. 350-351, 428). The population increase of Fayette County, including Metropolitan Lexington, has averaged about 3.5 percent compounded

annually since 1950, increasing from 100,000 in 1950 to 132,000 in 1960; about twice the national average. In the same period, industrial employment increased 122 percent and retail sales from $105,624,000 to $170,427,000 (R. 596; DX 96; R. 1235). It is estimated that the population will reach 165,000 in 1965, 193,000 in 1970, and 223,000 by 1975 (R. 984).

Lexington is the business and cultural center of the central and eastern half of Kentucky and is likewise the medical service center of the entire state, with two large federal hospitals, a state hospital, and a new medical school. It is the focal point of the state's educational facilities, with the University of Kentucky, Transylvania College and College of the Bible located there (R. 984).

Already the second city in size in the Commonwealth, Lexington's strategic location, ample labor supply and cultural and educational advantages indicate a continued rapid growth (R. 350-351, 428, 871).

Historically, First National was organized in 1865. It has had no mergers, reorganizations or acquisitions since 1929, when, at the instigation of Federal authorities, it took over the assets and assumed the liabilities of Fayette National Bank which was in severe difficulties brought on by the depression. It operated continuously as a national bank, developed a substantial commercial business, a secondary trust business, and at the time of the merger had an inadequate capitalization (R. 400, 878-879). Security Trust Company was organized in 1886 under state law as Security Trust and Safety Vault Company. Prior to the merger with First National, it had effected no other mergers, reorganizations or acquisitions in its history and for

many years provided the only corporate trust services in the area. Until comparatively recently it did not engage in commercial banking, and as a result at the time of the merger it had a substantial trust business, a secondary commercial banking business and an abundant capitalization (R. 327, 400).

There are four other commercial banks in the city: Citizens Union National Bank and Trust Company, Central Bank & Trust Company, Second National Bank and Trust Company, and Bank of Commerce. All are full service banks, advertising extensively their services, and are blessed with able management and with Boards of Directors representing a good cross-section of the business, social and political life of the community (R. 185, 260, 297, 1248).

The consequences which flow from this consolidation are the product of a sincere and genuine effort to alleviate an acute and rapidly growing economic problem that has come with the phenomenal growth of this area. The idea that these conditions created a real need for a larger bank in Lexington was first conceived by Mr. Ira J. Porter, Vice Chairman of The Louisville Trust Company, whose business dealings and close personal association with local bankers provided him with an intimate familiarity with Lexington and its economic and banking problems. Realizing that the capital structure, personnel and primary activities of First National and Security complemented each other, he suggested their consolidation to form a larger bank which could better serve the entire community (R. 348-349, 398-400, 426; PX 129; R. 938).

Certainly, the phenomenal industrial development of Metropolitan Lexington substantially improved the economic condition of the area and the state of Ken-

tucky as a whole. At the same time, however, this extensive growth created the banking problem which prompted this consolidation. Many satellite plants and service businesses were established to serve the larger industries and increased population. The larger national companies that had established local plants brought a minimum of funds with them in the form of bank deposits. Local banks were used largely for payroll and transfer accounts (R. 457; PX 129; R. 940-941). Efforts to satisfy the financial needs of these service industries, satellite plants and population increase soon resulted in all local banks finding themselves rather heavily loaned (R. 625; PX 109; R. 880). Certainly, industrial and commercial growth far exceeded the growth of local banks during this period (R. 478-479, DX 73, 1099).

Thus, these conditions created a definite need to increase the local supply of lendable funds. If this need was to be met, new sources of funds from outside the community had to be found. There appeared to be two possible sources for these funds. First, it was believed that a larger bank would have a substantially greater chance of persuading national companies with local plants to leave larger balances on deposit to aid in satisfying the need that they had helped to create. Another source for additional funds lay in the possibility of bringing in more correspondent bank deposits from small towns in Central and Eastern Kentucky (R. 428-429; PX 129, R. 940-941). Since none of the local banks had acquired any substantial amount of deposits from either of these sources, the efforts of the merged bank to obtain such funds would be primarily in competition with larger banks in Louisville, Cincinnati and elsewhere (R. 354). Additional deposits

that might be brought in from either of these sources would soon find their way into other local banks and would benefit them as well as the entire community. This would not give the merged bank any advantage over other local banks (R. 489, 501-502, 515-516, 524, 631).

An overwhelming volume of undisputed proof was presented to show that the merged bank would have a splendid chance of securing additional funds in the form of correspondent bank deposits from smaller banks throughout Central and Eastern Kentucky. The improved capital structure of the merged bank, its increased lending ability, its natural and ideal geographic location, plus the fact that Lexington serves as a retail, wholesale, educational, medical, hospital and recreational center for a wide area in Central and Eastern Kentucky, all demonstrate the fact that the merged bank stands in a vastly improved position to secure additional correspondent bank deposits (R. 496, 498-499, 501-503, 521-523, 534, 535, 548, 551-552). There is no reason why it cannot obtain a substantial volume of these deposits if the merger is permitted to stand (R. 487-488, 538, 548, 551) and success in this respect would go a long way toward alleviating the need for additional funds in Lexington (R. 508-509).

The sordid picture of economic depravity of the Appalachian region of which Eastern Kentucky is a part has been the subject of much concern.[5] Banks in

[5] Leading articles in several national magazines have given wide publicity to the economic plight of the people in this area. "*LIFE*," Jan. 31, 1964, pp. 54-65; *U.S. News & World Report*;" Jan. 20, 1964, pp. 36-39; "*The Saturday Evening Post*," Dec. 21 and 28, 1963. This may well be the key area that is the object of President Johnson's crusade against "poverty." Certainly, its deplorable condition occupied a substantial portion of his recent State of the Nation message to Congress.

Louisville, Cincinnati and other cities siphon substantial money from the mountain area (DX 95, R. 1229-1234) and offer little or no real help to meet its needs (R. 545-546). However, the closely knit ties of Lexington with Eastern Kentucky and its people are such that it is reasonable to expect that the merged bank would lend a more sympathetic ear to their problems than they now receive from more distant, larger banks. Both areas would certainly benefit if this merger stands.

The foregoing history of the banks, a consideration of the banking factors, the industrial growth and development of the Lexington area, the convenience and needs of the community, the demonstrated competitive ability of the other local banks caused the Comptroller of the Currency to conclude that ". . . the consolidation would not adversely affect competition and that the economic welfare of the Lexington community and the State of Kentucky would be served by its consummation," and that ". . . the proposed transaction would be in the public interest" (DX 93; R. 1226).

The Government's Evidence

Whether good or bad, the Government's position has been consistent in one respect throughout this case. It has steadfastly clung to its contention that *the size of the merged bank as of one date, without any other facts, is sufficient to constitute a violation of Section 1 of the Sherman Act.*

The Government's evidence consists of 131 exhibits and the testimony of an official from three of the remaining four local banks. Many of these 131 exhibits are statistical charts and tables which show the relative size of all local banks as of one date, viz., Decem-

ber 31, 1960. Not a single one of the Government's exhibits reflects any information whatever regarding past experience, growth or size of local banks on any other date, either before or after the merger.

The only testimony introduced by the Government came from three officials of the four remaining local banks. The Government seeks to give the Court the false impression that all four of the other local banks officially opposed the merger. (Appellant's Brief, page 11, footnote 8). In spite of his vehement personal opposition to the merger,[6] Mr. Clarke, the President of Citizens Union National Bank, was driven to admit that the Board of Directors of his bank had never taken any official stand one way or the other on the merger. He even admitted that some of the Directors of his bank may have expressed the belief that their bank would benefit if the merger stands (R. 207-208). The record suggests that the personal crusade of this witness against the merger may be attributable to his failure to bring about a merger of his own bank with First National in 1952 (R. 208-212). His testimony further suggests the possibility that those merger negotiations terminated because he was not given assurance that he would become chief executive officer of the resulting bank (R. 210-211). The record bears out

[6] Mr. Clarke was also a witness for the Government in the *Philadelphia National Bank* case. When asked by Government counsel as to the effect of concentration of banking facilities upon small and intermediate borrowers in the Lexington area, Mr. Clarke said: "I think the banks in our community take pretty good care of the borrowers. I don't think any deserving customers have not been able to meet their needs." And, further, as to the effect of the elimination of one bank, Mr. Clarke said: "If you eliminate one bank, that's one source; but we have still got plenty left down there, I assure you." (Original Record of *Philadelphia National Bank* case, pages 389-393).

the Government's statement that representatives from all of the remaining banks registered opposition to the merger with the three federal banking agencies and the Department of Justice. We suggest, however, that if the smallest bank in Lexington, the Second National, still opposed the merger at the time of the trial of this action, the Government would have produced a witness from that bank to testify. No such witness appeared and it seems a fair inference that that bank no longer opposed the merger. Therefore, to recapitulate, the most that can be truthfully said is that two other local banks officially opposed the merger at the time of the trial.[7]

Mr. Clarke's own testimony refutes the inference that the Government seeks to draw from its statistics. Moreover, it indicates that his strong personal opposition to the merger is prompted by some factor other than a genuine belief that his bank cannot effectively and successfully compete with First Security.

The consolidation in question occurred on March 1, 1961, and First Security operated as a consolidated bank and competed against other local banks for the last ten months of 1961. The results of these ten months of competition were available at the trial and were placed in evidence by the bank, but not by the Government (DX 35, R. 1053-1055). In comparing the nature and intensity of the competition that existed among local banks prior to the consolidation with that which existed after the consolidation, not a single Government witness saw any difference. Clarke said: "I can see no difference" (R. 251). Stilz, another

[7] Although there is no clear proof in the record on the point, an inference to this effect seems justified.

Government witness, admitted that he had observed no adverse effect of the merger upon any of the operations of his bank (R. 291). The other Government witness did not express himself on the point.

Although his bank competed against First Security for ten months during 1961, Clarke had no hesitancy in preparing and signing a report to his shareholders stating that his bank had experienced a "continued and unprecedented growth in its business" in 1961 (DX 2, R. 1009, R. 248). In the seven years since its merger in 1954, Clarke's bank had increased its total assets by slightly over $10 million (DX 1, R. 1007). About half of that seven year growth occurred in 1961, when it grew $5,049,369, in competition with First Security (DX 35, 1053). Actually, the growth of Clarke's bank in 1961 in terms of total assets "was over twice as much as during the four previous years combined" (R. 250). Clarke modestly conceded that his bank "did a pretty good job last year" (R. 236). His bank's gross operating income in 1961 was $1,269,929, the highest in the bank's history up until that time (DX 2, R. 1011; R. 248). Net earnings of his bank for 1961 were $277,854.25 (DX 2, R. 1012). In 1963, in competition with First Security, the gross earnings of Clarke's bank were $1,702,262 and its net earnings were $446,459.09.[8] Thus, in two years of apprehension of and competition with First Security, the gross earnings of Clarke's bank increased by more than 34 per cent and its net earnings increased by more than 67 per cent of what each was in 1961. As bearing on its future competitive ability, Clarke stated at year end

[8] Fifty-Seventh Annual Report to Stockholders, Citizens Union National Bank & Trust Company, Lexington, Kentucky, Annual Meeting—January 21, 1964. See Exhibit "B", AMR 27.

1961 that his bank "has all of the facilities, the financial resources and the ability to handle all of the good banking business (it) can get," in 1962 and ensuing years (DX 2, R. 1012; R. 251). This prophecy has certainly been fulfilled to date.

Clarke's efforts to contradict the foregoing amounts to nothing more than expressions of fear and apprehension concerning their ability to compete. He repeatedly said: "I am very apprehensive about that" (R. 196-197, 199). One of the Government's other witnesses said: "I assume" that it will be more difficult to compete (R. 268), and the other said that he thought it would be more difficult to compete (R. 300-302). All three expressed the opinion that if the merger stands, it is possible that other local banks may give consideration to a merger (R. 203, 269, 303-304). Even the Government concedes that the testimony of the three witnesses constitutes only "rough judgments". (Appellant's Brief, page 51.)

The foregoing is a fair summary of the Government's proof. It consists of exhibits showing size alone, surmise, and expressions of apprehension and fear. In three years of operations and competition with First Security, the other banks have not suffered from its size. Their surmise was erroneous and their apprehensions have not been justified. The statement that other mergers may be considered is entitled to no weight at all. The rigorous regulations to which bank mergers are subject refute any notion that a merger of other local banks will be permitted if it is not in the public interest or that it will be denied if it is in the public interest. When examined in the light of all the evidence and considering the obvious advantage which the trial court had in hearing and observing the wit-

nesses, the court's conclusion that the testimony of the Government's witnesses "seems based merely upon surmise and is lacking in factual support" (R. 1249) seems fully justified.

The Consolidated Bank's Proof

(a) *Commercial Banking.* The proof in behalf of the bank consists of 97 exhibits and the testimony of 18 witnesses. The testimony of seven of these witnesses was concerned with the improved ability and prospects of the merged bank to secure additional correspondent bank deposits. This testimony has been previously considered and it was clear, positive and uncontradicted.

Statistics reflecting the relative size of local banks as of one single date show absolutely nothing about the ability of banks to compete. For that reason, the bank's charts and tables cover a rather lengthy period preceding the merger. They show beyond doubt: (1) The extreme difficulties encountered by the largest local bank in competition with smaller local banks; (2) A substantial reduction in the relative size of the largest local bank resulting from years of competition with smaller local banks, and (3) A pattern of steady, substantial and significantly greater relative growth on the part of smaller local banks.

The dollar volume and percentage of total of all local bank deposits and loans are shown for each local bank at year end for each year from 1935 to 1960 (DX 22, R. 1035-1036; DX 26, R. 1040-1041). The Government insists that the mere fact that the merged bank held 52 per cent of the deposits, 53 per cent of the assets, and 54 per cent of the loans held by all local

banks at the time of the merger is sufficient without more to constitute a violation of Section 1 of the Sherman Act. Yet, at year end 1942, 1943 and 1944, First National held an even greater percentage of such deposits than First Security held at the time of the merger (DX 22, R. 1035; DX 35, R. 1053, R. 445). At the end of 1942, First National held 53.7 per cent of such deposits. Eleven years later at the end of 1953, First National had been reduced to the point where it held only 38.7 per cent of such deposits (DX 22, R. 1035; R. 445). Therefore, in a period of eleven years, First National, by far the largest bank in town, suffered a drop in its percentage of deposits of exactly 15 per cent. Perhaps, it will be said that percentages are misleading. In its dollar volume of deposits, First National held almost $43 million at the end of 1945. It was not until nine years later at the end of 1954 that this bank held that much money in deposits at year end again. No other local bank experienced the same problem, and in fact all others showed an increase in deposits in the same period. At the time of the merger, First National held only 40.1 per cent of such deposits (DX 22, R. 1036).

The same pattern exists in the loan field. At the end of 1936, First National held 56.8 per cent of all loans of all local banks. Again, this is a greater percentage than was held by First Security at the time of the merger. Yet, at the end of 1954, First National held only 36.6 per cent of such loans. Thus, in eighteen years of active competition with other smaller banks, First National, the largest bank, suffered a reduction of over 20 per cent in its percentage of loans. At the time of the merger it held only 40.2 per cent of such loans (DX 26, R. 1040-1041; DX 35, R. 1055).

Other facts illustrate the validity of the three points enumerated above. Central Bank was the last of the existing local banks to enter into active competition. It started around 1945, and at the end of that year it held $1,148,000 in deposits. At the same time, First National held a total of $42,923,000, and therefore was over 37 times larger than Central Bank. In competition with each other and all other local banks over the next fifteen years, Central Bank gained $12,996,000 in deposits while First National gained only $15,750,000, or less than $3 million more. During the same period, all other local banks showed a substantial deposit growth (DX 32, R. 1047).

At the end of 1945, all local banks held total deposits of $84,247,000. Of this total, First National held $42,933,000, or 50.9 per cent of the total. At year end 1960, all banks held $146,445,000. Thus, in this 15 year period all local bank deposits increased by $62,198,000. Of this total deposit growth, First National acquired $15,750,000, or 25.32 per cent. To have maintained the relative position which it held in 1945, First National would have had to acquire 50.9 per cent of this new growth. Therefore, it actually acquired less than half of the percentage of the growth necessary for it to maintain the relative position held by it in 1945. Again, Central Bank, which first became active in 1945, held only 1.4 per cent of the total deposits held by all Lexington banks in 1945. However, in the next 15 years this small bank acquired 20.90 per cent of all new or additional deposits acquired by all local banks. Every other local bank grew at a faster percentage rate than First National during that period (DX 32, R. 1047).

As stated, First Security operated as a merged bank for ten months during 1961. A comparison of the

relative position of First Security at the end of 1960* with its relative position at the end of 1961 shows a drop in the percentage of deposits, loans and assets during the year. In the important field of deposits, this decline was as great as 1.5 per cent where the drop was from 51.94 per cent to 50.44 per cent. The Government insisted that this was but the usual attrition that follows a merger. The proof is to the contrary. It shows that attrition generally is more severe in the correspondent banking field (R. 630). First Security lost none of its correspondent bank accounts in 1961. In fact, it gained two such accounts (DX 95, R. 1229). Further proof is now available on this point. Two more years of operations as a merged bank have elapsed since the trial of this action. As of June 29, 1963, the merged bank held 49.66 per cent of all local deposits and 50.58 per cent of all assets held by all local banks. A comparison of these percentages with those as of year end 1960 shows a percentage loss of 2.28 per cent in the deposit field and a loss of 2.12 per cent in the percentage of total assets (Exhibit "A", AMR, page 17).

The Government shrugs off our statistics, the decline of First National in size in times past and the decline of the merged bank since the merger with distrust and disbelief. They say that the record fails to show why these declines occurred and there is no reason to believe that they will be repeated. The simple fact is that the decline is repeating itself. Fortunately, the Court is not relegated to a crystal ball to see what has happened. We are no longer in a position where all we

*The banks were not consolidated until March 1, 1961, but the figures referred to show First National and Security combined as of the end of 1960.

can say is "history is likely to repeat itself." History is repeating itself. Three years of operations as a merged bank are now history. Guesswork is removed for that period and the decline continues. This graphically illustrates the extreme difficulty, if not the impossibility, of a bank the relative size of First Security maintaining its relative position in the keenly competitive atmosphere that is found locally. The record is filled with this axiomatic truth, which the Government chooses to reject.

On this appeal, it appears that all efforts to charge the bank with a Sherman Act violation in the lending field have been abandoned. Nevertheless, the Government's brief still contains statements of the relative size of the merged bank in several different types of loans (Pages 36 and 55, Government's Brief). The innuendo seems to be that there is evil here which the Government is willing to overlook. The evidence shows this to be incorrect. Basically, banks lend their deposits and the total amount of loans they can make is directly related to their total deposits. A bank with a larger volume of deposits can naturally make a greater volume of loans. However, the particular types of loans that banks do make is a matter of managerial choice and it may vary considerably from one bank to another (R. 407-408, 650-654). The proof clearly bears this out. The smallest local bank had the largest dollar volume of "Real Estate Loans Secured by Farm Land." Central Bank had over $1.8 million in "Other Loans Pertaining to Securities." First National, the largest bank, had none. Central Bank had almost $900,000 in "Loans to Individuals: To purchase other retail goods on Installment Basis," or more than twice as much as any other local bank (DX 39, R. 1365).

This certainly does not prove that these two smallest banks have the power to dominate these fields of lending. It does prove that they cater to those particular types of loans while other banks do not. In the field of commercial and industrial loans, First National held $7.5 million, Citizens Union held $6.1 million, while Bank of Commerce, a still smaller bank, held $6.2 million. Central Bank had no loans in this category (DX 39, R. 1365). As vigorous and successful as Central Bank has been in other fields, it cannot be truthfully said that the size and competitive efforts of other local banks kept it out of this field entirely.

In the field of "Single Payment Loans to Individuals for Personal Expenditures," First National held slightly over $5.5 million. Only two other banks in town held over $1 million in loans of this type and they were the two smallest banks in town. Citizens Union, the second largest bank in town, held not a single dollar in loans of this type (DX 39, R. 1365). The largest percentage of any particular type of loans held by First Security was in the field of F.H.A. Title I loans. It had a high percentage of this type of loan simply because other local banks refuse to be bothered by the "red tape" involved in making such loans. This was frankly conceded by one of the three Government witnesses.[10] Yet, in the eyes of the Government, First Security should be convicted of wrongdoing in fulfilling a need that other local banks refuse to be bothered with.

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[10] In explaining the position of his bank, Stilz said: "We have never gotten into that field. We make a type of loan that compares to the FHA, but it naturally is not an insured loan. We feel if the borrower is entitled to the credit we don't need the insurance. We feel if the loan is of such a nature that it ought to be insured, then we oughtn't to make the loan" (R. 274).

The Government insists that the size of a bank is a significant advantage in determining whether it can apply pressure on its competitors. Local experience clearly refutes this notion. As the legal ceiling on interest rates payable on time and savings deposits has been raised periodically in times past, two Government witnesses were forced to concede that the smallest local bank was always the first to actually adopt a policy of paying the maximum rate permitted by law (R. 249-250, 283-284). Later, the other larger local banks followed and adopted the same policy to remain competitive (R. 284).

The proof is that there are a multitude of cities in this country where the largest bank has as great or even greater percentage of the assets held by all local banks than First Security held at the time of this merger (DX 88, R. 1132-1188; DX 89, R. 1189-1205).[10a] Certainly, if there actually exists the evil consequences which the Government attributes to First Security's size alone, these same consequences would exist in countless other cities. Assuming these same evil consequences do exist in numerous cities, why would the Government leave this vital point of their case solely to conjecture and speculation? The Government's attorneys were able. Yet they produced not a single witness from any such city to so testify. To our minds, this gives rise to strong inference that there are no such evil consequences. The words of this Court in *United States v. United States Steel Corporation*, 251 U.S. 417, at 448 and 449, seem appropriate:

> "Besides the balance of the '40,000 customers' was open to the Government to draw upon. Not

[10a] The record shows that in 1956, the last year for which figures are available, in 124 cities with populations between 50,000 and 100,000, (including Lexington) 66 banks held more than 50 per cent of the assets and 47 banks held from 35 to 50 per cent of the assets. (DX 89, R. 1189).

> having done so, is it not permissible to infer that none would testify to the existence of the influence that the Government asserts? At any rate, not one was called, but instead the opinion of an editor of a trade journal is adduced, and that of an author and teacher of economics * * *. It has become an aphorism that there is danger of deception in generalities, and in a case of this importance we should have something surer for judgment than speculation, something more than a deduction, equivocal of itself, even though the facts it rests on or asserts were not contradicted."

First Security did not leave the matter to conjecture. It found and produced bankers from comparable cities in which the relative size of the largest bank was as large or larger than First Security and each of them testified unequivocally that size carried no such evil consequences with it (R. 525-530, 556-557; DX 80, R. 1108, DX 81, R. 1109, DX 82, R. 1110). The assumptions and inferences sought to be drawn by the Government cannot stand in the face of such positive proof.

(b) *The Trust Field.* We are confused as to what argument or contention, if any, the Government makes or intends to make in the trust field. A good bit of consideration is given to the question of whether there is a violation of Section 2 of the Sherman Act in the trust field.[11] However, the final mention of the matter

[11] At page 2 of its brief, under "Questions Presented," the second question listed is whether or not there is a violation of the Sherman Act in the field of trust services. At pages 22 to 25 of the brief they argue that trust services are a separate product market. Finally, at pages 53 to 55 of the brief they argue that there is a violation of Section 2 of the Sherman Act in the trust field.

in its brief is a statement that since a decision adverse to it on the Section 1 argument "would necessarily lead to a rejection of our Section 2 argument, there is no need for the Court to pass upon the more difficult Section 2 question, no matter how it decides the Section 1 issue" (Page 55, Appellant's Brief).

As we interpret its brief, the Government's present position is this. It has withdrawn its contention that there is a violation of Section 2 in the field of trust services and it no longer contends that:

(1) Trust services constitute a separate product market; and

(2) There is any violation of Section 2 in any product market in the case.

Commercial banking as a whole is the only relevant product market. All phases of commercial banking, including trust services, are to be considered as a whole in determining whether or not there is a violation of Section 1 of the Sherman Act. If this is the Government's present position, then we agree that it is correct. On the basis of this assumption, then the question at hand is whether the evidence as a whole, including that in the trust field, when considered with all of the other evidence, is sufficient to show that the trial court's finding of fact was clearly erroneous.

Figures and statistics again constitute the whole of the Government's case. Size is of little or no consequence in the trust field. After a bank begins to administer an estate, competition ceases for that business. The competition is for future trust business, not the assets which a bank already holds in trust (R. 360, 412, 672). The assets which the merged bank holds

were accumulated over a period of many years (R. 336).

There is a very real and significant difference between the trust business and the ordinary deposit and lending functions of a bank. People in need of loans and the deposit services of a bank will go to a bank somewhere. The same is not true of trust services. It is not a service that can be obtained only at a bank and however beneficial their trust services may be, the fact remains that people generally do not go knocking on the door of a bank to obtain this service. More people with a greater aggregate of wealth locally still do not feel any need whatever to use the trust services of local banks (DX 74, R. 1101; DX 75, R. 1103). In short, if a bank wants this business, it must go after it (R. 669) and any bank that actively and earnestly goes after the business will get it (R. 672). Success in obtaining this business does not depend upon the size of a bank at all. The small bank has equally as good chance of obtaining the business if it will go after it (R. 413, 567-568, 669, 671, 672, 680-684). The truth of the foregoing statements seems amply demonstrated by the fact that Security, a small commercial bank, acquired a substantially greater portion of the local trust business than any other local bank for a great many years.

The history of the trust activities of local banks clearly substantiates the foregoing. Security was organized in 1886 to serve primarily as a trust institution (R. 327). Directors of other local banks served as directors of Security in its early years (R. 328). Union Bank had trust powers continuously from its organization in 1906, but it never had a separate trust department. Citizens Bank had trust powers from its organization in 1931, but it did not have a separate

trust department until 1948 (R. 194, 227). At the trial of this action, the total personnel in Citizens-Union's trust department consisted of one full-time trust officer and two ladies employed as bookkeepers and secretaries (R. 227-228). Bank of Commerce has had trust powers since it was organized in 1916, but it has never had a full-time trust officer (R. 264). Its personnel in this department consisted of one man who devoted 5 per cent of his time to trust business and two ladies who were employed as clerks. One of these ladies was being trained to succeed the other, who was aged and needed help (R. 264, 277-278). Although the president of this bank said his bank sought trust business, the evidence clearly shows that it merely handles such business as comes to it through gravitation. In recent years a director of this bank, a past president for many years and the mother of its present president, passed away. All of their estates were administered by individuals. Its president, in his individual capacity, is now administering his deceased mother's estate (R. 278-279). In the past 22 years, out of town banks received a greater volume than Bank of Commerce of the probate business administered in our local probate court (DX 74, R. 1101).

At one time Security was "by far" the dominant bank in the trust field. Stilz, a Government witness, guessed that it held over 95 percent of the trust business held by local banks. About twenty years ago, First National hired a full-time trust officer and put forth a "special effort" in this field and has succeeded in obtaining a substantial amount of this business (R. 288-289). In about 1956, Second National, now the smallest local bank, acquired trust powers and it has been fairly successful in obtaining business of this type

(R. 328-329; DX 33, R. 1048). Since this consolidation occurred, and only two or three months prior to the trial of this case, Central Bank acquired trust powers and began operating a trust department for the first time "with anticipation of success in it, in spite of the fact that the merger had already taken place." A substantial new addition to that bank was then under construction and a portion of it was to house its new trust department. At the time of the trial it had already obtained trust business and it expected to be able to develop this phase of its business (R. 318-320). Since the trial of this action, Central Bank has hired an experienced full time trust officer and is aggressively seeking the business. The foregoing actions speak louder than assumptions or even words to the contrary. If a bank chooses not to vigorously seek this business, no one should be able to compel it to do so. However, if a bank chooses that course, it should not be heard to complain when another bank goes to the trouble and expense of obtaining it. If the directors and officials of a bank and their immediate families do not use the trust facilities of their bank (R. 278-279), it is hardly surprising that the general public will look elsewhere for such service.

Assuming local banks are willing to put forth the effort and go to the expense necessary to get trust business, it seems appropriate to determine if there is sufficient business available to warrant such activity. Again, the proof is undisputed. The Government stresses the importance of trust services to corporations (Page 23, Appellant's Brief). The amount of this business done by local banks is so insignificant that neither the banks nor the corporations concerned would miss it if it were eliminated (DX 56, R. 1075). Hence, we are concerned with the personal trust busi-

ness. From 1940 to 1961, individuals administered estates valued at over $79 million in the Fayette County Court, which is some $9 million more than the carrying value of all trust assets held by all local banks at the end of 1960 (PX 35, R. 786; DX 74, R. 1101).

If the Government's premise were correct, any bank would be foolish to start a new trust department from scratch in a city where a bank already had an established trust department. Certainly, there are cities where this has been done where a disparity exists in size of trust and commercial departments comparable to that found here. If experience had shown that such disparity in size rendered it impossible to develop a trust department, we are confident that the Government would have had the foresight and ability to find and produce witnesses to so testify in this case. They failed to produce a single witness and left the matter to conjecture. The bank found and produced several witnesses with a contrary experience, and their testimony stands undisputed (R. 412-413, 566-568, 671-672, 680-685). In the face of this evidence, the surmise and conjecture of the Government to the contrary cannot stand.

SUMMARY OF ARGUMENT

The first inquiry is whether the evidence is such that this Court can say that there is clear error in the factual finding of the trial court that the consolidation did not result in an unreasonable restraint of trade in commercial banking. It is our contention that the finding of the trial court is sustained by the overwhelming weight of the evidence. We accept the trial court's factual finding that Fayette County is the relevant geographic market, although there is substantial evi-

dence to the contrary. Whether we are right or wrong in our assessment of the Government's present position, we insist that commercial banking as a whole is the only relevant product market.

The Government again urges this Court to adopt the rule that a merger of two thriving competitors ipso facto violates Section 1. The same four old railroad cases are put forth as support for its contention (Appellant's Brief, pages 28-34). This Court has rejected this argument.[12] It is as unsound as ever and it should be rejected again. In taking this approach, the Government seeks to avoid the sensible test set forth in *United States* v. *Columbia Steel Co.*, 334 U.S. 495, which we think is applicable. The supposed rule of the railroad cases is not the only effort of the Government in this case to avoid applying the test of *Columbia Steel*. Next, they argue that the merger would violate Section 7 of the Clayton Act under *United States* v. *Philadelphia National Bank*, 374 U.S. 321, and this factor should be given substantial weight in deciding whether there is a violation of Section 1 of the Sherman Act. Their own argument correctly recognizes the substantial difference between the tests of two Acts. Otherwise, there would be no gain to them from seeking shelter under the umbrella of the much less stringent Clayton Act test. The Government chose to do battle and they selected their weapon. Fairness requires that they be held to their choice and that they

[12] In *United States* v. *Columbia Steel Co.*, 334 U.S. 495, at 531, this Court rejected this identical argument. There, this Court said: "The factual situation in all those cases is so dissimilar from that presented here that they furnish little guidance in determining whether the competition which will be eliminated through the purchase of Consolidated is sufficient to warrant injunctive relief requested by the government."

measure up to the rigid standard they freely selected. In short, we insist that the test of *Columbia Steel* should be applied in determining whether this merger violates Section 1 of the Sherman Act. A consideration of the evidence relating to each factor of the *Columbia Steel* test will clearly show that there is no such violation.

Finally, the merged bank has filed a motion asking this Court, before passing on the Section 1 question, to remand the case to the district court with directions to hear, and transmit to this Court for filing as a supplemental record herein, proof regarding competition between local banks since the trial of this action, and regarding problems of divestiture created by operating the consolidated bank as a single institution since March 1, 1961.

We realize the rarity of such a motion. However, the opportunity now available to this Court is equally rare. In the usual antitrust cases the competitive effects of mergers and consolidations have been determined without the benefit of actual operating experience. Three years of actual operating experience in competition with the merged bank is now history. Fears and apprehensions were expressed by local bankers as to their ability to compete. Before deciding the Section 1 question, we urge this Court to grant us the privilege of placing evidence in the record of the effect of actual operations during this period. We firmly believe that the activities of other local banks in the interim plus their post-merger competitive experience will convince the Court that there is no longer any basis for their expressed fears and apprehensions. However, whether we are right or wrong in the foregoing, no one can dispute the statement that a more

intelligent and accurate judgment can be rendered with the benefit of such evidence.

A divestiture of the merged bank is sought. This remedy is completely novel and unique in the field of commercial banking. The order entered at the outset of this action required the merged bank to keep its records, "insofar as may be reasonably possible," under banking laws and regulations, "and in accordance with sound banking practices," so that if a dissolution was ever ordered the assets could be equitably divided between the two consolidating banks (R. 72). To our knowledge this is the first effort anywhere to operate a bank under such an order. We do not believe that we have violated the letter or the spirit of the order, but three years of actual operations have created unforeseen problems that cannot be solved by divestiture. We have had no opportunity to present evidence of our three years' experience in the matter. Even if the Court should finally conclude that a violation of Section 1 has been shown, justice and fair play should permit us to present evidence of our experience and problems of divestiture before any order of divestiture is actually entered.

ARGUMENT

I. THE EVIDENCE AFFIRMATIVELY SHOWS THAT THIS CONSOLIDATION HAS NOT RESULTED IN AN UNREASONABLE RESTRAINT OF TRADE IN VIOLATION OF SECTION 1 OF THE SHERMAN ACT

To sustain the illegality of the consolidation under Section 1 of the Sherman Act, the Government was obliged to produce proof sufficient to constitute "a definite factual showing of illegality" (*Appalachian Coals, Inc.* v. *United States*, 288 U.S. 344, 377; *Times-Picayune Pub. Co.* v. *United States*, 345 U.S. 594, 622).

That this is a Sherman Act case brought by the Government does not change the rule that the factual findings of the trial court should not be set aside unless they are found to be clearly erroneous. The case of *United States* v. *Yellow Cab Co.*, 338 U.S. 338, is peculiarly applicable where the exact problem presented here faced this Court. A summary of the problem was stated thusly (338 U.S. at page 340):

> "The government relied in large part on inferences from its 485 exhibits, introduced by nine witnesses. The defendants relied heavily on oral testimony to contradict these inferences."

In rejecting the Government's contention in the foregoing case, this Court said (338 U.S. at pages 341-342):

> "It ought to be unnecessary to say that Rule 52 applies to appeals by the Government as well as to those by other litigants. There is no exception which permits it, even in an antitrust case, to come to this Court for what virtually amounts to a trial *de novo* on the record of such findings as intent, motive and design. While, of course, it would be our duty to correct clear error, even in findings of fact, the Government has failed to establish any greater grievance here than it might have in any case where the evidence would support a conclusion either way but where the trial court has decided it to weigh more heavily for the defendants. Such a choice between two permissible views of the weight of evidence is not 'clearly erroneous.'" [13]

[13] Other antitrust cases in which the identical rule has been applied are *United States* v. *United States Gypsum Co.*, 333 U.S. 364, 395, and *United States* v. *Oregon State Medical Soc.*, 343 U.S. 326, 332 and 339.

Not even a hint of illegality in the merger can be deduced from appellant's evidence. However, the merged bank does not rest at this point. Its evidence contains a positive, affirmative showing that the consolidation is wholly free of illegality.

A. Commercial Banking is the Only Relevant Product Market in the Case

Our understanding of the Government's brief is that they now concede this to be true. Whether they concede it or not, such was the ruling of the district court in the *Philadelphia National Bank* case [14] in which this Court concurred on appeal.[15] Implicit in all previous government efforts to segregate commercial banking into the various subordinate cluster of services for relevant product market purposes has been the notion that if the Government thought no evil existed in a particular banking field, that field could not constitute a separate product market.[16] While the demand deposit function is unique to commercial banks, it is not that function, but rather the whole cluster of services, that sets the commercial bank apart from other financial institutions. If the competition of other types of financial institutions is to be eliminated from consideration, it can only be because commercial banking as a whole is the only relevant product market.

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[14] 201 F. Supp. at 363, where the district court said: "It is the conglomeration of all the various services and functions that sets the commerical bank off from other financial services. Each item is an integral part of the whole, almost every one of which is dependent upon and would not exist but for the other."

[15] 374 U.S. 321, 356-357.

[16] For example, in the trial court in this case, the Government insisted that each of five separate phases or fields of banking constituted a separate relevant product market and in each field the Government argued that the size of the merged mank was ipso facto sufficient to show a violation of the Sherman Act.

B. The Merger of Two Healthy Competitors, Without More, is Not Sufficient to Constitute a Violation of Section 1 of The Sherman Act.

Asserting four old railroad cases as precedent, the Government urges the Court to adopt the rule that any merger of two major thriving competitors violates Section 1 of the Sherman Act. They seek to lessen their burden by having mergers placed in the category of per se violations. As noted, this same argument based upon the same four cases was made and rejected in the *Columbia Steel* case (334 U.S. at 531). The *Columbia Steel* case was decided some 25 years after the most recent of the four railroad cases cited by the Government. The *Columbia Steel* test was applied in 1953, five years after its origin, in *Times-Picayune Pub. Co.* v. *United States,* 345 U.S. 594, at 615. The foregoing seems ample to refute the Government's argument. However, there is more.

Exactly the same argument was also rejected by this Court in *Appalachian Coals* v. *United States,* 288 U.S. 344, at 360-361, in this language:

> "The mere fact that the parties to an agreement eliminate competition between themselves is not enough to condemn it. 'The legality of an agreement or regulation cannot be determined by so simple a test, as whether it restrains competition'."

Congress has aligned itself with this Court in rejecting the view that the mere elimination of competition between two thriving competitors is sufficient without more to constitute a violation of the Sherman Act.

In the Senate Report that accompanied the 1950 Amendment to the Clayton Act, it was said:[17]

> "Section 7 of the Clayton Act was originally written to reach effects beyond those prohibited by the Sherman Act, *extending to the reduction of the competition which had previously existed between the acquiring and the acquired companies.* This latter feature, namely the effect on competition between the acquiring and acquired corporations, has been regarded as the distinctive 'Clayton Act test,' insofar as it relates to Section 7 of the Act."

In *Columbia Steel* this Court refused to examine these four railroad cases because the factual situations were so dissimilar "that they furnish little guidance" (334 U.S. at 531). Cognizant of this, the Government strains to find what it argues is a similarity between banking and transportation in the fact that each is vital to "every form of trade and industry" (Appellant's Brief, pages 33-34). This reasoning is spurious. In short, it is that if two industries are vital to trade and commerce, they are similar. Nothing can be gained from further pursuit of this argument.

In short, we insist that the only rational guide that fully examines all competitive consequences of a merger is the test of *Columbia Steel*. The Sherman Act is not an elementary mathematical formula. It is a rule of law that deals with economic realities and regulates competition. However helpful such might be to the Government, it should not be reduced from a rule of law and economics to a rule of arithmetic.

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[17] Senate Rep. No. 1775, June 2, 1950 [To accompany H.R. 2734], U.S. Code Cong. Serv., 1950, pp. 4295-4296.

C. Section 1 of The Sherman Act, Undiluted by Section 7 of The Clayton Act, should be applied in Testing the Legality of This Consolidation

Judicial legislation is sought by the Government. This Court is asked to dilute the rigid standard of Section 1 of the Sherman Act by superimposing thereon the far less stringent test of Section 7 of the Clayton Act, and thus in effect repeal the Sherman Act. Subtle phrases and ingenious theories do not obscure the end that is sought, which is to apply Clayton Act tests to determine if there is a Sherman Act violation.

Arguments that the tests of the two acts "are complementary," that the Clayton Act "illuminates" the Sherman Act, and that the "rule of reason" bestows flexibility to the Sherman Act "to adapt to modern means and unforeseen situations" (Appellant's Brief, pages 41-43) do not alter the fact that there is and has always been a substantial difference between the tests of the two Acts.

While the broad purpose of both Acts is to prohibit harmful competitive practices, the scope of the two Acts is entirely different. Each occupies its own niche. For the Sherman Act to apply, there must be an actual unreasonable restraint of trade which is a *fait accompli*. The Clayton Act was designed to nip these harmful practices in their incipiency.[18] Historically, the original Clayton Act of 1914 and the 1950 amendment thereto were written to plug loopholes created in the Sherman Act by the *Standard Oil*[19] and

[18] See *Standard Fashion Co.* v. *Magrane-Houston Co.*, 258 U.S. 346, at 355-356.

[19] *Standard Oil Company of New Jersey* v. *United States*, 221 U.S. 1.

Columbia Steel cases. In short, the Clayton Act was intended to prohibit practices not covered by the Sherman Act.[20]

The entire argument of the Government is that the public policy and competitive tests of the 1950 Clayton Act Amendment should be held to be a part of the Sherman Act in determining the legality of this merger. This is wholly repugnant to the intent that Congress itself expressed in explaining the purpose of the 1950 Amendment. Congress expressed itself as follows:[21]

> "The purpose of H.R. 2734 was to make this legislation extend to acquisitions which are not forbidden by the Sherman Act. But here a problem presented itself. While on the one hand it was desired that the test be more inclusive and stricter than that of the Sherman Act, on the other hand it was not desired that the bill go to the extreme of prohibiting all acquisitions between competing companies. * * *
>
> "* * * *The Committee wish to make it clear that the bill is not intended to revert to the Sherman Act test. The intent here,* as in other parts of the Clayton Act, *is to cope with monopolistic tenden-*

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[20] See 1949 Cong. Rec. 11730, where it is stated: "Broadly stated, the bill, in its treatment of unlawful restraints and monopolies, seeks to prohibit and make unlawful certain trade practices which, as a rule, singly and in themselves are not covered by the act of July 2, 1890 [the Sherman Act] or other existing antitrust acts and thus, by making these practices illegal, to arrest the creation of trusts, conspiracies, and monopolies in their incipiency and before consummation." See also *Brown Shoe Co.* v. *United States*, 370 U.S. 294, at 318, footnote 33.

[21] Senate Rep. No. 1775, June 2, 1950 [To accompany H.R. 2734], U.S. Code Cong. Serv., 1950, pp. 4296-4297.

cies in their incipiency and well before they have attained such effects as would justify a Sherman Act proceeding. * * *

"These various additions and deletions—some strengthening and others weakening the bill—are not conflicting in purpose and effect. *They merely are different steps toward the same objective, namely, that of framing a bill which,* though dropping portions of the so-called Clayton Act test, that have no economic significance, *reaches far beyond the Sherman Act.*"

Less than two years ago in *Brown Shoe Co.* v. *United States,* 370 U.S. 294, at 328-329, this Court approved the foregoing Congressional mandate that the Clayton Act tests were less stringent than Sherman Act tests by saying:

"And the legislative history of § 7 indicates clearly that the tests for measuring the legality of any particular economic arrangement under the Clayton Act are to be less stringent than those used in applying the Sherman Act."

The Government says that the Sherman Act has been applied to prohibit conduct which is more pointedly the subject of Clayton Act proscriptions. Although this is questioned in *Brown Shoe,*[22] let it be assumed that such is true and proper. The Govern-

[22] 370 U.S. 294, at 318, where the Court said: "Fourth, and closely related to the third, Congress rejected, as inappropriate to the problem it sought to remedy, the application to § 7 cases of the standard for judging the legality of business combinations adopted by the courts in dealing with cases arising under the Sherman Act, and which may have been applied to some early cases arising under original § 7."

ment implies that if such is the case, then the converse may also be done. This is a non-sequitur. The application of such a rule would be a shocking injustice.

The end sought by the Government is the elimination of any necessity for a consideration of difficult standards of economic proof and a substitution of the simple, mechanical percentage test of Section 7 of the Clayton Act that was applied in the *Philadelphia National Bank* case. The Court answered such an argument in *Times-Picayune Pub. Co.* v. *United States*, 345 U.S. 594, at 622, thusly:

> "But this suit was not brought to adjudicate a trade practice as banned by specific statutory prohibitions which by a clearly defined public policy dispense with difficult standards of economic proof."

The whole argument of the Government on the point was answered in *Times-Picayune* (345 U.S. 594, at 609-610) as follows:

> *"The Government at the outset elected to proceed not under the Clayton but the Sherman Act. While Clayton Act's more specific standards illuminate the public policy which the Sherman Act was designed to subserve, * * * the Government here must measure up to the criteria of the more stringent law."*

Consequently, we insist that the Sherman Act, undiluted by the Clayton Act, must be applied in determining the validity of this consolidation.

D. Under the Columbia Steel Test, the Evidence Affirmatively Shows That the Merger Has Not Resulted in an Unreasonable Restraint of Trade Under Section 1 of The Sherman Act

Certain fundamental principles enunciated by this Court in *Times-Picayune Pub. Co.* v. *United States*, 345 U.S. 594, are peculiarly appropriate to the case at hand. "*[T]he (Sherman) Act deals with competitive realities, not words.*" (345 U.S., at 615). "Under the broad policy directed by § 1 against unreasonable trade restraints, *guilt cannot rest on speculation; the Government here has proved neither actual unlawful effects nor facts which radiate a potential for future harm*" (345 U.S., at 622). [T]he Times-Picayune's sales of both general and classified linage over the years hovered around 40%. *Obviously, no magic inheres in numbers; 'The relative effect of percentage command of a market varies with the setting in which that factor is placed'* " (345 U.S. at 612).

The guide for testing the validity of a merger under the Sherman Act's broad, general prohibition on unreasonable restraints of trade was stated in *Columbia Steel, thusly* (334 U.S. at 527-528):

> "In determining what constitutes unreasonable restraint, we do not think the dollar volume is in itself of compelling significance; we look rather to the percentage of business controlled, the strength of remaining competition, whether the action springs from business requirements or purpose to monopolize, the probable development of the industry, consumer demands, and other characteristics of the market. We do not undertake to prescribe any set of percentage figures by which to measure the reasonableness of a corporation's

enlargement of its activities by the purchase of the assets of a competitor. The relative effect of percentage command of a market varies with the setting in which that factor is placed." [23]

We are confident that an analysis of the evidence under the *Columbia Steel* test will show that "the Government here has proved neither actual unlawful effects nor facts which radiate a potential for future harm." [24] Abundant affirmative evidence exists to show that after three years of actual experience, the consolidation has not operated "to unreasonably restrict the opportunities of competitors to [acquire and] market their product." [25]

I. Dollar Volume, Percentage of Business Controlled and the Setting in Which That Factor is Placed

The Government's figures, both as to dollar volume and percentage of business held by the merged bank

[23] A similar test had been set forth in *United States* v. *Chicago Board of Trade*, 246 U.S. 231, at 238, where this Court said: "To determine that question the Court must ordinarily consider the facts peculiar to the business of which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts. This is not because a good intention will save an otherwise objectionable regulation or the reverse; but because knowledge of intent may help the Court to interpret facts and to predict consequences."

Substantially the same test was followed in *Times-Picayune Pub. Co.* v. *United States*, 345 U.S. 594, at 615, where this Court said: "For our inquiry to determine reasonableness under § 1 must focus on 'the percentage of business controlled, the strength of the remaining competition [and], whether the action springs from business requirements or purpose to monopolize.'"

[24] *Times-Picayune Pub. Co.* v. *United States*, 345 U.S. 594, at page 623.

[25] *United States* v. *Columbia Steel Co.*, 334 U.S. 495, at 524.

as of the one single date are correct. However, sharp conflict arises when the Government's rank speculation and inferences which are predicated on size alone are placed alongside the bank's positive proof that the merger has not had and will not have any adverse effect on the competitive ability of other local banks. We concede that the size of the merged bank is one of several relevant factors. However, this court has consistently held that mere size alone, without more, is not sufficient to constitute a violation of Section 1 of the Sherman Act. This principle seems to have been stated first in *United States* v. *United States Steel Corporation,* 251 U.S. 417, at 451, where this Court said:

> "[S]hall we declare the law to be that size is an offense . . .? The corporation is undoubtedly of impressive size, and it takes an effort of resolution not to be affected by it or to exaggerate its influence. But we must adhere to the law, and the law does not make mere size an offense . . ."[26]

Capital combinations controlling 50 percent,[27] 64 percent[28] and 90 to 95 percent[29] of the national industry in their particular fields have been sustained

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[26] To the same effect see *United States* v. *International Harvester Co.*, 274 U.S. 693, at 708, where the rule was stated: "The law, however, does not make the mere size of a corporation, however impressive, . . . an offense . . ." In *United States* v. *Swift & Co.*, 286 U.S. 106, at 116 this Court again stated: "Mere size according to the holding of this Court is not an offense against the Sherman Act unless magnified to the point at which it amounts to a monopoly."

[27] *United States* v. *U.S. Steel Corp.*, 251 U.S. 417.

[28] *United States* v. *International Harvester Co.*, 274 U.S. 693.

[29] *United States* v. *United Shoe Machinery Co.*, 247 U.S. 32.

from Sherman Act attack by this Court. These cases do not conclusively show the legality of the present merger. They do show the fallacy of the Government's argument that the mere size of the bank as of one day is such that the merger is conclusively illegal.

We recognize that in *Philadelphia National Bank* this Court found it unnecessary to consider the setting in which the percentage of business controlled is placed. However, the basis assigned for that ruling was Congressional intent supplied by the Clayton Act Amendment of 1950. Because the Clayton Act is not involved here, plus the fact that this Court has recently stated in *Times-Picayune, Columbia Steel, Chicago Board of Trade*[30] and in one other more recent case[31] that the relative effect of percentage command of a market varies with the setting in which that factor is placed, we submit that it is relevant to consider the setting in which that percentage factor is placed in this case.

In the ordinary commercial business world competitors own their assets and they are free of governmental supervision, regulation and control. The competitive aura is largely determined by the interplay of supply and demand. Business failures naturally result, but this is not regarded as too high a price to pay for the advantages that flow from unrestricted competition. Harsh experience has taught this nation that disastrous consequences flow from applying the same undiluted principle to commercial banking. While competition in banking is desirable and beneficial to a point, there is a clear limit to the amount

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[30] See footnote 23, infra.

[31] *Federal Communications Commission* v. *RCA Communications, Inc.*, 346 U.S. 86, at 98.

of competition in banking which is in the public interest.[32] A sound, solvent bank is the only kind of a good bank there is (R. 403) and it is more in the public interest that banks remain solvent than that unlimited competition flourish in banking. Therefore, this seems a pertinent factor in determining the relative effect of the percentage command of a market.

The fact that banks do not own but owe their stock in trade (deposits) is another pertinent factor. Poor service or loss of public confidence can deplete the stock of a bank overnight. While private businesses may lose their customers or their trade for the same reasons, such a business will not suffer the loss of its assets for the same reason.

There is significance to these factors. Whatever ability to control or influence competitors or the market that size may have in the ordinary, unregulated private business, it is clear that it carries no such power or influence in the banking industry.

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[32] See Berle, Banking Under the Anti-Trust Laws, 49 Col. L. Rev. 589, at 592, where this theory is stated as follows: "It is the theory, in ordinary commercial fields, that competition is the desirable check on price levels—the process by which the efficient are rewarded by survival, and the inefficient eliminated by failure. The price of business failures is not regarded as too high for the community to pay in view of the advantages to consumers, stimulus toward greater efficiency, and freedom of enterprise. But it is doubtful (to say the least) whether any such assumption is indulged in with respect to deposit banks; certainly the theory is not accepted to the full extent of its logic. A bank failure is a community disaster, however, whenever, and wherever it occurs. While competition may be desirable up to a point in deposit banking there is a clear bottom limit to its desirability. * * * The economic and social premises of the Sherman Act is respect of other businesses are not fully accepted by the Congress, the States, or the public, as the only consideration applicable to deposit banking."

No other explanation is consonant with the facts of this case. The facts previously stated can be explained in no other way. The largest local bank with a greater percentage command than First Security has ever had declined 15 percent in its percentage of local deposits in eleven years (DX 22, R. 1035-1036). A local bank that began from scratch with practically no deposits acquired almost as many dollars in deposits in the next fifteen years as the largest bank which began the period with almost $43 million in deposits (DX 32, R. 1047). The largest local bank began that fifteen year period with 50.9 percent of all local deposits. In that fifteen years it acquired 25.32 percent of all new local bank deposits, or less than half of the percentage necessary for it to maintain its relative position. In the same period, the bank that started from scratch acquired 20.90 percent of all new local bank deposits. This is not fantasy—these are facts that are undisputed. There are many more that have been previously stated. The Government makes no effort to explain these facts or to square them with its contention.

In short, the facts clearly show that percentage ratios alone do not furnish a reliable test for measuring the power of banks to compete with one another.

II. Strength of Remaining Competition

If the principles stated above are relevant in determining the ability and influence of the percentage leader in the market, then the same principles are necessarily relevant in determining the strength of remaining competition.

Following this merger there are five healthy local banks. Even now Lexington has a greater number of unit banks than most comparable cities in the coun-

try (DX 64, R. 1084-1088). The Government says there were ten local banks in 1929 (Appellant's Brief, page 12), as though there was an evil that reduced the number. The circumstance that reduced the number was the depression, during which four banks failed (DX 38, R. 1058). Each of the present banks is well managed and successful in its chosen sphere of operations. At the time of the merger, these five banks had a total of fifteen banking offices in the county. Very shortly, the county will have nineteen banking offices. All four of the new offices belong to other local banks. One other local bank will shortly have a new head office and—"This will be the first new bank quarters erected in downtown Lexington within the last half century" (Exhibit "C", AMR, page 29). The smallest bank in town had no branches at the time of this merger, but it will have two branch offices shortly. The second largest bank will shortly have one office less than First Security and one more than First National had when the merger occurred (AMR, page 31).

Since the merger, Central Bank, now fourth in size locally, has completely renovated and enlarged its head office. It has installed a new downtown drive-in window, the only one in existence, and has acquired substantial parking area for its customers which no other local bank has. It has acquired trust powers for the first time, hired an experienced, aggressive trust officer, and has been successful in securing trust business in this short time (AMR, page 6).

These are the post merger activities of those who expressed such fear and apprehension of their ability to compete. These are the realities of the situation. They completely refute their contrary words.

Comparing the size of local banks as of June 29, 1963, with their size at the time of the merger is also enlightening. In its holdings of local assets First Security dropped from a percentage of 52.7 to 50.58 and in total depoosits it dropped from 51.94 to 49.66. Total deposit growth of all local banks in this period was $47.7 million. Of this total growth First Security obtained $20.3 million or slightly over 42 percent of this new growth. All other banks obtained $27.4 million or more than 57 percent of the new growth. In this period of two and one-half years Central Bank almost doubled the dollar volume of its assets and deposits (Exhibit "A", AMR, page 17). This is not idle speculation. These are the facts of actual experience. No more telling proof can be found. The trends that preceded the merger and the trends that were found between the merger and the trial still continue.

Speculation on the strength of remaining competition is unnecessary. Their activities and the results of those activities graphically show that strength is there in abundance. There is no better guide for determining their strength.

III. Whether the Action Springs From Business Requirements or Purpose to Monopolize

The purpose behind this merger has been stated in detail. Apparently, the Government agrees, as we do, with the district court's findings that the merger was not necessary to save one or the other of the two banks, but they had no predatory purpose in merging (Appellant's Brief, page 37). The district court also found that the merger was the "result of a lawful program of expansion" to meet the needs of an area that "has grown and expanded industrially to a remarkable extent" in recent years (R. 1249). We see

no need to repeat the business reasons for the merger. That there was no intent, purpose or desire to monopolize seems conceded, but, if not, the fact that the idea of a merger was first conceived by a man who had no connection with or interest in either bank clearly shows the correctness of the trial court's findings.

IV. The Probable Development of the Industry, Consumer Demands, and Other Characteristics of the Market

The word "probable" may be stricken and the word "actual" inserted because the Court has the unusual opportunity of examining the actual development of local banking for a period of three years after the merger. The evidence is irrefutable. A look at the activities and achievements of other local banks in this interim shows that they have been more dynamic, more progressive and successful than in any other comparable period in their history. First Security has not stagnated, but the fact remains that it has not kept pace with the others.

We turn our attention to consumer demands. The lending limit of the merged bank is $500,000 to any one customer. This is double the lending limit of First National (DX 14, R. 1027; DX 15, R. 1028). In the period between the merger and the trial, First Security extended lines of credit for more than $250,000 to 20 customers. Eighteen of those customers had used a greater part or all of this credit in that period. In the same period five loans were made that exceeded the old lending limit of First National (R. 453-455). That trend also continues. Today, it has 15 loans outstanding in which the face amount of each exceeds $250,000. These 15 loans aggregate slightly less than $6 million (AMR, page 11). This is indicative of a

fair, if not a substantial need, for a bank the size of First Security.

Fully aware that it was refuted by the evidence, the Government intimates that the lending needs of large borrowers could have been better served by the two banks separately. It points to the fact that the old legal lending limits of the two separate banks when combined exceed the lending limits of the merged bank, which is true (Appellant's Brief, page 8). The conclusion sought to be drawn by the Government is erroneous for two reasons. First, the legal lending limit of Security was most unrealistic. Its deposit structure was so small that it was wholly unlikely that it would seriously consider a loan of its legal limit to a single customer (R. 356-357, 639). Next, two or more banks in the same community, rarely, if ever, join in a participation loan with a single customer. One bank is simply not willing to expose its customer to the contact and service of a competitor for fear of losing the customer (R. 233).

The phenomenal growth of the area continues. Since the trial of this action, The Trane Company and Westinghouse Air Brake Company have built large local plants, bringing more workers, more satellite service industries and more need for credit. At least one large regional shopping center, the first in the area, now seems a reality (AMR, page 7). We do not say that the merged bank has been responsible for this growth or that it is an absolute necessity for continued growth. We do say that it can be a beneficial factor in this continued expansion. In its three years it has served the public well. It can continue this in the future if it is permitted to stand.

Neither words, nor figures and statistics as of one single date, but competitive realities should be used to judge the validity of this merger. Such is dictated by the incisive standards of *Columbia Steel*. When the full competitive impact of this merger is viewed in the light of those standards, it seems obvious that there is no unreasonable restraint of trade in commercial banking.

II. BEFORE PASSING ON THE SECTION 1 ISSUE, THIS COURT SHOULD CONSIDER REMAND OF THE CASE TO THE DISTRICT COURT WITH DIRECTIONS TO HEAR AND TRANSMIT TO THIS COURT FOR FILING AS A SUPPLEMENTAL RECORD HEREIN, PROOF OF COMPETITIVE DEVELOPMENTS SINCE THE TRIAL OF THE CASE AND PROOF REGARDING PROBLEMS OF DIVESTITURE CREATED BY OPERATING THE CONSOLIDATED BANK AS A SINGLE INSTITUTION FOR THREE YEARS

A dominant thread in the web of Sherman Act antitrust law is that it deals in realities and facts. Guesswork and speculation play no part in it. Much thought and deliberation preceded the filing of the motion to remand and supporting affidavit. It is unusual, but it is no more unusual than the opportunity now presented to this Court. Three years of operations as a merged bank in competition with other local banks have passed. There can be no better way of judging the competitive effects of the merger than by looking at the actual results of these three years of operations. Surely, the Government will not object to a procedure which will give this Court the full benefit of these actual facts in deciding the Section 1 question. There has been delay and this delay has created manifold, if not insurmountable, problems of divestiture, but it is difficult to see how postponement of the decision for another six months or a year could further compound that problem.

A. The Divestiture Problem

Further, divestiture is the sole remedy sought. From the Government's brief, and the record, this Court would be justified in concluding that divestiture would be a simple matter that could be accomplished overnight. This is a gross misconception. The problem is monumental.

One of the attorneys for the Government in our case has ably stated the problem in these words:[33]

> "In the *New York* and *Lexington* cases the banks legally merged a few hours before the suits were filed. As a result, no motion for even a temporary restraining order could be heard. * * *
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> "In these cases, where the merging banks have merged before a temporary restraining order or temporary injunction could issue, serious problems, insoluble by any divestiture decree, may have been created. Even attempts made in good faith to keep separate the properties and accounts of merged banks pending a final decision on the merits of a challenged merger, cannot avoid extreme inconvenience to innocent parties. Banking is unlike a commercial or industrial business where assets, factories or divisions may be split off without great harm to the corporate body. It

[33] The foregoing statments were made by Hon. Larry L. Williams in affidavits filed in October, 1963, in support of a Government motion for a preliminary injunction to enjoin the merger of two California banks pending a final decision on the merits. The case was styled "United States of America, Plaintiff, v. Crocker-Anglo National Bank, Citizens National Bank, and Transamerica Corporation, Defendants." The action was in the U.S. District Court, Northern District of California. Copies of the complete affidavits are filed as Exhibits N and O to the affidavit of LeRoy Miles. See AMR, pages 41 to 57.

is basically a service business whose various functions and services are intertwined. A commercial bank owes, not owns its inventory, i.e., deposits. Confidence in the ability and capability of a banking firm to render a cluster of services to its customers is vital to its operations. Confidence and stability, priceless ingredients, may be destroyed or seriously impaired during the uncertainties of divestiture proceedings.

"The following questions, among others, have been raised by bankers and their counsel in connection with the Department's litigation in this field. Can a Federal Court by decree force the State or the Comptroller of the Currency to grant a charter to the bank created by the divestiture? Can a Federal Court compel a bank to transfer loan accounts or capital to a reconstructed bank? Can a Federal Court compel the transfer of a portion of the trust business of one bank to another? A Federal Court might be able to compel the resignation of one bank as a fiduciary, but can it appoint a successor fiduciary? In the case of wills, testamentary trusts and irrevocable trusts, a bank could resign only after making a proper accounting in the appropriate state courts. But such state courts might choose not to appoint either the old or the newly created bank, following divestiture, as the successor fiduciary.

"Moreover, operation problems would be very serious in a divestiture proceeding. Integration of persons, equipment and operational techniques would have to be unraveled. Officers of the merged bank would have to devote a larger part of their

time in working out the divestiture and the future position of many would be in doubt.

"All that can be said with certainty at this time is that no court has yet restored by a decree any competition suppressed by a bank merger.

"To say that because divestiture is now being sought in other suits, divestiture is feasible is a non-sequitur. The only certainty about that divestiture relief is that the longer those suits remain pending the harder the problems of divestiture will become. The uncertainties and hardships that Mr. Solomon asserts will occur if Crocker and Citizens cannot merge will only be compounded if they do merge and divestiture is ultimately ordered. The only way to avoid these uncertainties and injury to the banks, innocent third parties, and banking competition in California is to prevent this merger until a hearing on the merits can be had."

The far reaching impact of any attempted divestiture of a merged bank has been expressed thusly:[34]

"The picture of an attack on a bank merger after it has been consummated is a shocking one. Public confidence in the institution would be shaken and might be entirely destroyed. The task of disentangling the two components of the merged bank would be almost insuperable. Great loss might result to shareholders, and possibly to the public."

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[34] Funk, Antitrust Legislation Affecting Bank Mergers, *Banking Law Journal*, May, 1958, at page 381.

Recognition of the monumental nature of the problem of divestiture under the Sherman Act has led Congress to seek an alternative route via the Clayton Act to prevent the consummation of mergers pending a decision on the merits of the Antitrust issues.[35] Three affidavits of local bankers on problems of divestiture filed by the Government in support of its motion for a restraining order in this case now appear quite ac-

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[35] *Hearings Before the Antitrust Subcommittee of the House Committee on the Judiciary on H.R. 6748, H.R. 7229 and H.R. 8332, 84th Cong., 2d Sess. (1956)* at page 13, where Hon. Wright Patman stated: "Actually, our courts and our enforcement agencies have had little experience in trying to draw dissolution orders. As yet they have had no experience in trying to draw an order under the Celler-Kefauver antimerger law. As for that matter, there have been relatively few dissolution decrees under the Sherman Act during the 65 years that law has been on the books.

"*But experience under the Sherman Act has demonstrated that it is about as difficult to unscramble the assets of a corporation as it is to unscramble an egg.* In addition to this difficulty, there is a vital weakness in the law which attempts to undo mergers rather than to prevent mergers.

"The law is not concerned with assets as such. Its purpose is to maintain competition. Yet the remedy in the law deals in fact with assets, and not with attaining the purpose of the law. In short, the law contains powers for ordering the divestiture of assets but there are no powers for recreating competition or even recreating a competitor."

Ibid at page 18, Mr. Patman continued: "Certainly we must have a procedure by which objectionable mergers can be stopped before they are made. Unscrambling clearly will not work."

Similar statements are contained in the report of the foregoing hearings at pages 29, 34-35, 49 and 158-159.

See also *Hearing on S. 3911 Before a Subcommittee of the Senate Committee on Banking and Currency, 84th Cong., 2d Sess. (1956)* at page 35, where it is said: "Advance approval would not only provide the requisite protection of the public interest but afford banks contemplating a merger assurance that it would not be inconsistent with the law. *There are obvious difficulties in attempting to unscramble the assets and liabilities of constituent banks after a merger has occurred. This is particularly true after considerable time has elapsed.*"

curate."[36] In one of these affidavits this statement appears (R. 32):

> "In my opinion, if the merger * * * is culminated and all assets of the two banks are combined, such as consolidating all checking accounts, savings accounts, trust accounts, loans, all general books and other assets, *it would probably be impossible to separate them in the event said merger was later disapproved by this Court.*"

The order entered after the merger in this case required that "insofar as may be reasonably possible" under applicable banking laws and regulations, "and in accordance with sound banking practices," the merged bank would keep its internal records in the manner therein prescribed (R. 72).

Three years of operations have produced countless problems not foreseen when that order was entered. Doubtless, many more vexing problems would appear in such an event which cannot now be foreseen.

In the field of checking accounts, the merged bank had a total of 23,641 such accounts as of January 1, 1961, two months before the merger. As of December 31, 1963, the bank held 27,827 checking accounts. Thus, it has acquired at least 4,186 new checking accounts that neither bank held at the time of the merger."[37] In

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[36] See affidavits of Robert Stilz (R. 23-27), Ernest S. Clarke (R. 28-31) and Charles E. Cool (R. 32-34).

[37] The number of new checking accounts that neither bank held prior to the merger is probably nearer 8,000. It has not been possible to check each individual account to determine this exact figure. Certainly, the bank has lost accounts in the ordinary course of business in the interim which are not reflected in the foregoing figure.

the field of savings accounts it held 10,059 accounts as of January 1, 1961. As of the end of 1963, it held 14,110 such accounts for a net increase of 4,051 new customers in this category.[38] Thus, there is at least a net increase of 8,237 new deposit customers who were not customers of either bank prior to the merger. The merged bank now holds a total of 41,937 demand and savings deposit accounts. Thus, a minimum of 20 percent of the number of its present depositors were not customers of either bank at the merger. If divestiture is ordered, no Court has the power to require these depositors to keep their accounts in a particular bank. A court might direct where they would be put in[illegible]ly, but it would take only a matter of minutes for the customer to move it. It is a reasonable assumption that an appreciable number would leave both banks. (AMR, pages 8 to 9).

In the summer of 1961, the difficulties of maintaining separate bookkeeping and posting departments for demand deposits became insuperable and all such records of the two banks were combined and meshed together. They remain together to this day. Checks written on "First Security" were going to the wrong office for payment. Some were returned marked "No Account" when the customer had an account in the other. Time deadlines under local clearing house rules for the return of bad checks could not be met. Justifiable customer complaints became so numerous that no other solution seemed "in accordance with sound banking practices." The accounts that were meshed in 1961 were marked to identify the bank they came

[38] The observations in footnote 37 above apply equally to savings accounts.

from, but experience has shown that this will not solve the problem. A divestiture of a bank has never before been ordered and it is not unreasonable to expect that such an order could produce a chaotic "run on the bank". so common in depression days. Loyalties to one's own pocketbook run far deeper than loyalties to a bank. The average man on the street cannot be expected to understand "divestiture," and he will not hesitate to withdraw his hard-earned money at the slightest hint that his bank is in trouble, irrespective of the nature of its trouble. (AMR, page 9).

The field of loans is closely tied to deposits, since a bank has nothing but deposits to lend. Doubtless, many of the 1960 loans were paid in the interim. For certain, however, the merged bank now holds loans that were not held by either bank at the time of the merger. How these could be divided is indeed a mystery. It is true that loans have been made in the Security office and in the First National office and in all other branches since the merger. However, the total amount of loans made was not related to the deposit structure of either pre-existing bank. Total loans made were related only to the total deposits of the merged bank because no separate record of deposits were kept. Assuming that loans and deposits are divided on a pre-determined ratio and the ratable share of each is set aside, the amount of loans must be related to the amount of deposits set aside to each. If a substantial number of depositors choose to leave the bank assigned to them, that bank could easily end up with more loans than deposits. Regulatory authorities would doubtless close that bank immediately if that occurred. (AMR, page 10).

Since the merger, this bank has raised its interest rates on savings deposits to 4 percent. To pay this high interest rate, the bank has had to heavily concentrate its loans into real estate mortgage loans, a large majority of which are to be amortized over a period of 15 years. The two banks separately simply cannot accommodate the volume of mortgage loans that the merged bank now holds. The loans cannot be called, and what do you do? As previously noted, the merged bank now holds 15 loans where the amount of each loan exceeds $250,000. The total of all of these loans is slightly less than $6 million. If divestiture is ordered, none of these loans could be assigned to First National because its legal lending limit was $250,000. Security's deposit structure would not begin to support such a volume of loans of that size (AMR, pages 10 to 11).

There are additional factors involved in any effort to allot depositors and borrowers to one or the other bank. Since the merger, former Security customers have become accustomed to using former First National branches where they were more convenient and vice versa. After a lapse of three years, the convenience factor will likely override any pre-existing loyalty or any divestiture order. Again, all requirements of the order of March 6, 1961 (R. 71-73) have been complied with in the lending field, but this does not solve any of the problems listed above (AMR, page 11).

The problems in the investment portfolio are closely related to those in the lending field. There has never been and there could not be any separation of the securities held in the investment portfolio of the merged bank. Securities held from time to time have matured

and have been redeemed, converted and reinvested, all for the single merged bank. Again, the 4 percent interest paid on savings has caused a sharp rise in investments in municipal bonds of a long term maturity. It has tripled holdings of these bonds since the merger and it presently holds more than $10½ million in them. This is more than should be held by two separate banks, and if divestiture should be ordered, the only course possible would be to sell the excess at a substantial loss to shareholders (AMR, pages 11 to 12).

A look at the stock transfers discloses that 191 of the present shareholders owning 24,041 shares in the merged bank were not shareholders in either bank when the merger occured. An additional 11,024 shares have been acquired by 143 shareholders who were shareholders in one of the pre-existing banks. Thus, 35,065 shares of a total of 200,000 outstanding shares have changed hands since the merger. The 191 holders of the 24,041 shares did not purchase stock in any pre-existing or recreated bank. They purchased stock in the merged bank. If dissolution is ordered, can these shareholders be forced to accept stock in one or the other of the recreated banks over their objections? A reluctant or a disgruntled shareholder is something less than an asset to a bank. Even if it is directed that the stock is to be traced back to one or the other of the pre-existing banks and reissued in that bank, grave difficulties remain. At the time of the merger there were 73 shareholders who owned stock in both pre-existing banks. These shareholders owned 11,521 shares in First National and 7,709 shares in Security (R. 974-975). These common shareholders were issued a total of 29,243.2 shares in the merged

bank. It is certain that many of these shares have changed hands. When stock is traced to one who owned stock in both pre-existing banks, is the new shareholder to be issued stock in both recreated banks, and if not, in which of the recreated banks is he to receive stock? (AMR, page 12).

The general ledger and account books of the merged bank are kept without regard to either pre-existing bank. Compliance with regulatory and examining requirements rendered it impossible to do otherwise. Regulatory authorities have treated the merged bank as a single unit and all periodic reports have been prepared and submitted for the single bank. (AMR, page 13).

Earnings from loans, securities, trust and real estate commissions, rent and other activities have been commingled without regard to either pre-existing bank. While it would perhaps have been possible to keep trust earnings separate, on existing estates such would have helped little, since the major part of the total earnings of the bank came from loans and investments which could not be segregated or related to either pre-existing bank. Tax returns have been filed and taxes paid on all earnings as a single unit. The problem of an equitable division of net earnings is as difficult as any on divestiture. (AMR, page 13).

In the trust field, the order of March 6, 1961, has been met. Yet, substantial problems exist. The merged bank now has 83 active trust accounts in which it holds assets carried at a value of $4,172,550 wherein neither pre-existing bank was designated as the fiduciary. In 48 of these accounts, wherein it holds assets worth $2,259,050, it is the trustee of inter vivos trusts.

Where these trusts are revokable, the settlor would doubtless revoke the trusts if they should be ordered to one of the two banks not selected by him. Where the trusts are irrevocable, we doubt the power of a federal court to appoint one or the other bank as a successor trustee. The Fayette County Court would have the power to appoint a successor and it might well choose to appoint a third bank as the successor trustee. In 21 of the remaining accounts where the bank holds assets valued at $1,162,800, the bank was appointed as fiduciary by the Fayette County Court and exactly the same problem exists. Eleven of the remaining 14 accounts are agency accounts which would certainly be revoked if allocated to a bank unsatisfactory to the creator. (AMR, pages 13 to 14).

For some time there has been only one proof and transit department, one bookkeeping and posting department and one general book and auditing department. The separate personnel of the two pre-existing banks have been commingled into single departments. The turnover of personnel in these departments is very heavy. It is largely old First National personnel that remain, and if divestiture is ordered Security would have to re-establish these three departments without adequate personnel. Other serious personnel problems would be presented. While First Security has a balanced staff with management succession well provided for, the same would not be true of Security on divestiture. Several of those who were key personnel of Security have been lost since the merger, and if an effort should be made to re-establish Security, a sizeable gap in age and experience would exist between Mr. Dabney, its former president, and the next

in line. Mr. Dabney is now past normal retirement age. Consequently, a real and pressing problem in management would face the smaller bank. (AMR, pages 14 to 15).

Public confidence is probably the most priceless asset of any bank. Constant vigilance, service and effort over a period of years are necessary to its creation and continuance. Yet, like a person's good reputation, it can be lost overnight. No one has the wisdom and prescience to accurately predict the ultimate effect of a divestiture on this vital element. Conceivably, it could be destroyed. Most likely, the smaller of the two re-created banks would suffer the greatest damage in this respect, because it has lost all semblance of separate identity in the three years the merged bank has operated. (AMR, page 15).

Most of the discussion has related to internal difficulties of divestiture. Even so, it is doubtful that there is any clear line of demarcation between internal difficulties and the public interest at large. A healthy, stable bank in which public confidence is vibrant is the only bank that is in the public interest. While it is difficult, if not impossible, to foresee the full impact of a divestiture upon the public interest, it is obvious that the damage could be irreparable. The pre-existing competitive situation simply cannot be restored. Borrowers would be subjected to an entangled snarl that would defy unraveling. Deposit customers would be put to asking "where is my money and which bank do I write a check on to withdraw it and take it to another bank." These are not idle speculations. These are the innumerable perplexing problems that a divestiture would cause the bank and the public.

B. History of the Law of Divestiture

Keeping in mind that no court has ever faced the problem of the possible divestiture of a bank, we look to the history of how the judiciary has dealt with the situation in the ordinary commercial enterprise where the problem is much less acute. In *United States* v. *United Shoe Mach. Co. of New Jersey*, 247 U.S. 32, there seems to have been at least a tacit admission of a violation of the Sherman Act. Yet, because of the lapse of time between the consolidations and the consideration of the case by this Court, plus numerous other changed conditions and difficulties of divestiture listed in the opinion, this Court refused a decree of dissolution.

In *United States* v. *United States Steel Corp.*, 251 U.S. 417, this Court weighed the public interest that would be served by dissolution against the public interest of leaving the combination undisturbed and concluded that a dissolution would be more inimical to the public interest.[39]

The case of *United States* v. *Aluminum Co. of America*,[40] which lasted for more than 20 years, seems helpful The company was finally adjudged to be

[39] 251 U.S. 417, at page 457, where this Court said: "In conclusion, we are unable to see that the public interest will be served by yielding to the contention of the Government respecting the dissolution of the company or the separation from it of some of its subsidiaries; and we do see in a contrary conclusion a risk of injury to the public interest, including a material disturbance of, and, it may be serious detriment to, the foreign trade. And in submission to the policy of the law and its fortifying prohibitions the public interest is of paramount regard."

[40] The complaint was filed in this case on April 23, 1937, and it was still active in June, 1957. Opinions in the case are reported in 44 F. Supp. 97, 148 F. 2d 416, 91 F. Supp. 333, and 153 F. Supp. 132.

guilty of antitrust violations and the case was remanded to the district court to determine the appropriate remedy. In the course of determining this problem the district court said (91 F. Supp. 333, at 345):

> "It is not unreasonable to suggest that a court may act more readily to keep apart what has never been joined together, than to dismember an existing entity which, in general, has well served the public."

The district court weighed the public interest that might be served by divestiture against the public interest of leaving the company together and finally refused a decree of divestiture. It retained jurisdiction for a reappraisal of the competitive situation at the end of another five years (91 F. Supp. at 416-419). At the end of this five year period, an application by the Government to extend jurisdiction for an additional five years was denied (153 F. Supp. 132).

In *United States* v. *General Electric Co.*, 115 F. Supp. 835, at page 870, the court states that "present competition and the promise of future competition [are] the criteria by which it is determined whether or not to order the divestiture of a defendant in an antitrust suit." We invite the use of that test in this case. Under that or any other test, the facts compel the conclusion that the merger should remain intact.

C. Precedent for the Order of Remand

The benefit to be gained from an order of remand is demonstrated by *Appalachian Coals* v. *United States*, 288 U.S. 344, at 377-378, where this Court stated:

"We think that the Government has failed to show adequate grounds for an injunction in this case. We recognize, however, that the case has been tried in advance of the operation of defendant's plan, and that it has been necessary to test that plan with reference to purposes and anticipated consequences without the advantage of the demonstrations of experience. If in actual operation it should prove to be an undue restraint upon interstate commerce, if it should appear that the plan is used to the impairment of fair competitive opportunities, the decision upon the present record should not preclude the Government from seeking the remedy which would be suited to such a state of facts."

The power of this Court to remand the case, without reversal and before deciding the Section 1 question, for further enlightenment on supervening events seems inherent. The general rule was expressed in *Patterson* v. *State of Alabama*, 294 U.S. 600, at 607, thusly:

> "We have frequently held that in the exercise of our appellate jurisdiction we have power not only to correct error in the judgment under review but to make such disposition of the case as justice requires. And in determining what justice does require, the Court is bound to consider any change, either in fact or in law, which has supervened since the judgment was entered."

Some other cases in which this rule has been applied are: *Ashcraft* v. *State of Tennessee*, 322 U.S. 143, at 156; *State of Minnesota* v. *National Tea Company*,

309 U.S. 551, at 555; and *State Tax Commission of Utah* v. *Van Cott*, 306 U.S. 511, at 515.

The motion filed in this case seeks a remand of the case, without ruling or reversal, to permit this Court to have the benefit of evidence bearing on the competitive picture and divestiture problems supervening since the trial of this action. The general rule permitting such a procedure is stated in 5B C.J.S. 235-236, Appeal & Error, Section 1836d, as follows:

> "Where necessary to the furtherance of justice, a case on appeal may be remanded, without decision, for the introduction of further evidence. * * *
>
> "[I]t is generally held that an appellate court has the power to remand a cause for the introduction of further evidence where the interests of justice will be thereby subserved."

Such a procedure seems to have been followed by this Court in the case of *Norris* v. *United States*, 53 Ct. Cl. 638, remanded in 250 U.S. 648; 55 Ct. Cl. 208, affirmed 257 U.S. 77.

Nothing would be accomplished by a reversal of the judgment if the motion to remand is sustained. The trial court has delivered an opinion on the record as it stands. The evidence that would be introduced on remand would be wholly factual in nature, largely undisputed and an extension or addenda to the original record. The evidence could be quickly collated, introduced and any conflict of facts resolved by the trial court. Such could then be transmitted and filed as a supplemental record in this Court. A more enlightened and sounder judgment would necessarily follow.

CONCLUSION

The judgment of the district court should be affirmed because the Government has failed to establish a violation of Section 1 of the Sherman Act. In the alternative, if doubt exists on the Section 1 question, this Court should sustain the motion to remand without passing on the Section 1 question, with directions to the trial court to hear and transmit for filing as a supplemental record herein, proof of facts that have developed since the trial of this case regarding the local competitive situation and the difficulties of divestiture of the bank.

Respectfully submitted,

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